

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

NEW MEXICO CATTLE GROWERS'
ASSOCIATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants,

and

AMIGOS BRAVOS, NEW MEXICO
ACEQUIA ASSOCIATION, and GILA
RESOURCES INFORMATION
PROJECT,

Intervening Cross-Claimants-Defendants,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Cross-Defendants.

Case No. 1:19-cv-00988-RB-SCY

**DEFENDANTS/CROSS-DEFENDANTS' AMENDED PROPOSAL TO
FURTHER STAY PROCEEDINGS**

Pursuant to this Court's February 10, 2021 Order directing the Parties' to file either a joint motion or separate proposal to further govern this proceeding, *see* Dkt. No. 59,

Defendants/Cross-Defendants (“the Agencies”), hereby propose to stay the above-captioned proceeding until June 1, 2021. The Agencies have good cause for this request.

1. In 2015, the Agencies revised the regulatory definition of “waters of the United States.” *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (“2015 Rule”).

2. In 2017, the Agencies began reconsidering the 2015 Rule. They conducted a notice-and-comment rulemaking process that resulted in the Agencies issuing a final rule repealing the 2015 Rule and reinstating the pre-2015 Rule regulatory definition of “waters of the United States.” *See* 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019) (“Repeal Rule”). The Repeal Rule went into effect on December 23, 2019. *Id.* at 56,626.

3. On January 23, 2020, the Agencies signed a final rule—the Navigable Waters Protection Rule (“NWPR”)—promulgating a revised definition of “waters of the United States.” The NWPR was published in the Federal Register on April 21, 2020, and went into effect on June 22, 2020. 85 Fed. Reg. 22,250 (Apr. 21, 2020).

4. Plaintiff initiated this lawsuit on October 22, 2019, challenging the Repeal Rule. Dkt. No. 1.

5. On April 27, 2020, Plaintiff sought leave to file a supplemental complaint to add challenges to the NWPR. Dkt. No. 24. This motion for leave was granted the same day. Dkt. No. 25.

6. On June 30, 2020, the Court granted Intervening Cross-Claimants-Defendants’ motion to intervene. Dkt. No. 37.

7. Also on June 30, 2020, Intervening Cross-Claimants-Defendants filed a cross-complaint against the Agencies challenging the NWPR. Dkt. No. 38.

8. On May 26, 2020, Plaintiff filed a motion to preliminarily enjoin, in part, the NWPR. Dkt. No. 30. The Agencies and Intervening Cross-Claimants-Defendants opposed that motion. Dkt. Nos. 34, 40. On February 10, 2021, Plaintiff's motion for preliminary injunction was denied without prejudice. Dkt. No. 59. The Court noted that Plaintiff may refile the motion at a later date, "if necessary." *Id.*

9. There are no other outstanding motions before the Court in this matter.

10. On January 20, 2021, President Biden issued an Executive Order entitled "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). In conformance with the Executive Order, the Agencies are reviewing many rules promulgated in the last four years, including the NWPR at issue in this case.

11. Accordingly, to give appropriate officials adequate time to review the NWPR and determine whether the rule should be maintained, modified, or otherwise reconsidered, the Parties filed, and the Court granted, a motion to stay this matter until May 1, 2021. Dkt. Nos. 58, 59. The order granting the motion to stay, however, ordered that if the 10th Circuit rules on the *State of Colorado v. EPA* appeal (20-1238) before May 1, 2021, the Parties must meet and confer and file a joint motion or separate proposals to further govern proceedings no later than 14 days after the 10th Circuit decision. *See* Dkt. No. 59.

12. Indeed, on March 2, 2021, the 10th Circuit ruled on the *State of Colorado v. EPA* appeal (20-1238), reversing the preliminary injunction order issued by the District of Colorado in

the underlying proceeding. *See State of Colorado v. U.S. Env'tl. Prot. Agency*, No. 20-1238, 2021 WL 790999 (10th Cir. Mar. 2, 2021).

13. The Parties have since met and conferred. Plaintiff has proposed that the stay be lifted. Plaintiff further stated it intends to re-file its motion to preliminarily enjoin the NWPR.

14. The Agencies propose extending the stay by one month, until June 1, 2021, to allow time for the Agencies to further evaluate the NWPR.

15. When the Parties initially requested the stay, the Agencies lacked key personnel who will be involved in reviewing the NWPR. Michael Regan only recently, on March 11, 2021, became the EPA Administrator, and the Agencies need sufficient time to evaluate the NWPR and brief Mr. Regan and other decisionmakers as part of their ongoing review process.

16. The Agencies' review of the NWPR may ultimately lead to the modification or withdrawal of the rule. If that occurs, proceeding with this case may be an unnecessary expenditure of judicial and party resources.

17. Intervening Cross-Claimants-Defendants have stated that they take no position regarding the Agencies' proposal to stay this case until June 1, 2021. Given the relatively brief extension of the stay proposed by the Agencies, granting this proposal will not unduly prejudice any party, will conserve the Parties' resources, and will promote the interest of judicial economy.

18. The Agencies' proposal is without prejudice to the right of any party to seek a further stay at the end of the abeyance period.

For the foregoing reasons, the Agencies respectfully request that the Court stay this proceeding until June 1, 2021.

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Dated: March 16, 2020

Respectfully submitted,

/s/ Hubert T. Lee

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COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that, on March 16, 2021, I electronically transmitted the foregoing to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to registered counsel for all parties.

/s/ Hubert T. Lee